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No. 04-1528

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

—v.—

WILLIAM H. SORRELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on candidate spending violate the First Amendment and this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

2. Whether Vermont's treatment of independent expenditures by political parties and committees as presumptively coordinated if they benefit fewer than six candidates, and thereby subject to strict contribution and expenditure limits, is consistent with the First Amendment and this Court's decision in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996).

3. Whether Vermont's contribution limits, which are the lowest in the country, which allow only a single maximum contribution in an entire two-year general election cycle, and which prohibit even state political parties from contributing more than $400 to their gubernatorial candidate, fall below an acceptable constitutional threshold and should be struck down.

LIST OF PARTIES

Petitioners are Neil Randall, George Kuusela, John Patch, Steven Howard, Jeffrey Nelson, and the Libertarian Party of Vermont.

Consolidated Plaintiffs are Marcella Landell, Donald R. Brunelle, Vermont Right to Life Committee, Inc., Political Committee, Vermont Republican State Committee, and Vermont Right to Life Committee-Fund for Independent Political Expenditures.

Respondents are the Attorney General of the State of Vermont, William H. Sorrell, the Secretary of State of the State of Vermont, Deborah Markowitz, and various state and local officials charged with enforcement of the challenged statute: John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, and Robert L. Sand.

Respondent-Intervenors are Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

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OPINIONS AND ORDERS BELOW

The district court's opinion is reported as *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000), and is reprinted in the Appendix to the Petition for Certiorari in No. 04-1528 ("P.A.") at 21a-89a. The Second Circuit's original decision, 300 F.3d 129 (2nd Cir. 2002), was withdrawn and is not reprinted. The Second Circuit's amended opinion, 382 F.3d 91 (2nd Cir. 2004), is reprinted at P.A. 90a-312a.

Rehearing and rehearing en banc were denied on February 11, 2005. P.A. 313a-314a. The Order denying rehearing was subsequently amended to reflect the separate concurring and dissenting opinions of the circuit judges. P.A. 315a-344a (Second Amended Order). The third and final Amended Order was issued after the Petitions for Certiorari in this matter were filed and is reprinted in the Joint Appendix (J.A.) at 98-110.

JURISDICTION

The Second Circuit's amended decision was entered on August 18, 2004. On February 11, 2005, that court entered an order denying plaintiffs' petition for rehearing *en banc*. A Petition for Certiorari was filed in No. 04-1528 on May 11, 2005 and in No. 04-1530 on May 12, 2005. Both petitions were granted and the matters consolidated by this Court on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

1997 Vt. Laws Pub. Act 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64") is set out in full at P.A. 1a-20a.

Subsequent to trial and after the petitions for certiorari were filed, the Vermont legislature passed Senate Bill 16, 2005 Vt. Laws Pub. Act 62, which contains certain amendments to 17 V.S.A. §§ 2801 et seq. The amendments have an effective date of July 1, 2005. A copy of 2005 Vt. Laws Pub. Act 62 is set out in an appendix to this brief.

STATEMENT OF THE CASE

This is a First Amendment challenge to Vermont's comprehensive campaign finance law, 1997 Vt. Laws Pub. Act 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64"). Vermont's law was adopted in 1997 with the "express intent" of challenging *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and became effective the day after the November 1998 election. The explicit goals of Act 64 were to reduce campaign spending, limit the length of campaigns, and influence the manner in which campaigns are conducted.

Act 64 directly challenged *Buckley* by imposing mandatory, unprecedented limits on the amount of money candidates for statewide or legislative office may lawfully raise and spend on their campaigns. These spending limits apply to all candidates, even those who spend their own funds. Moreover, the Act broadly defines an "expenditure" to bring within the law's regulatory purview virtually all of a candidate's activities during a campaign. Thus, campaign expenditures include not only staff, paid advertising, media, and direct mail, but also the costs of complying with the law, various personal and in-kind expenses such as the use of a candidate's own car and phone, and certain independent expenditures made by third parties. The Act limits the right of political organizations to make independent expenditures supporting a candidate by presuming that certain

expenditures are coordinated with the candidate. These "related expenditures" are treated as contributions to the candidate and count against the candidate's mandated spending limit. The Act also imposes the lowest contribution limits of any state in the country. Those limits apply equally to individuals, political parties, and committees. A separate provision limits the amount of money candidates can raise from out-of-state sources.

This case arises from three separate lawsuits filed in 1999 and 2000, which were consolidated in the district court. The plaintiffs are involved in various capacities in Vermont electoral politics and include a sitting legislator seeking re-election, candidates for future offices, political parties and political committees, and individual contributors and constituent-voters. The defendants are the State officials responsible for enforcement of the Act and a number of individuals and advocacy groups that were allowed to intervene. After a ten-day bench trial in May and June, 2000, the district court upheld many of the challenged provisions but enjoined enforcement of the candidate spending limits, the candidate contribution limits as applied to contributions from political parties, and the restriction on out-of-state contributions. P.A. 24a-26a.

All parties appealed the district court's decision to the Second Circuit. That court's initial 2-1 opinion, issued in August 2002, upheld in large part both Act 64's contribution and expenditure limits. P.A. 95a. After plaintiffs filed a motion for rehearing, the panel withdrew this opinion. *Id.* Two years later, the same divided panel of the Court of Appeals again upheld most of the provisions of Act 64, but remanded to the district court to decide whether the expenditure limits were narrowly tailored to advance the State's interests. P.A. 95a-97a. Plaintiffs' motion for rehearing en banc was denied in an order accompanied by multiple concurring and dissenting opinions. P.A. 315a-344a; J.A. at 98-110.

A. Vermont's Act 64

Expenditure limits. Act 64 limits all candidate spending during a two-year election cycle. 17 V.S.A. § 2805a. Candidates for statewide office are restricted to varying amounts depending upon the position sought: the candidate for governor is limited to $300,000; the lieutenant governor to $100,000; and candidates for other statewide offices to $45,000. *See* 17 V.S.A. §§ 2805a(a)(1)-(3).[1] Candidates for state senator and county office are limited to spending $4,000, with senate candidates permitted an additional $2,500 per seat in multi-seat districts. 17 V.S.A. § 2805a(a)(4). Candidates for state representative in single-member districts can spend no more than $2,000, and those in two-member districts no more than $3,000. 17 V.S.A. § 2805a(a)(5). These limits apply on a two-year election cycle basis, not per election, and provide for no adjustment regardless of whether a candidate has a primary. *See* 17 V.S.A. §§ 2801(9), 2805(a), 2805a(a).

The expenditure limits must be understood in the context of the Act's broad definitions. Act 64 defines "expenditures" to include a "payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value . . . for the purpose of influencing an election." 17 V.S.A. § 2801(3). The breadth of this language is indisputable, and was chosen purposely to sweep all campaign activities within Act 64's regulatory scheme, thus ensuring that limits could not be avoided. Given its ordinary meaning, the language includes the value of the use of personal phones, computers, offices, rooms in residences, paper, pencils, personal automobiles, etc. P.A. 211a. The

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[1] Only candidates for governor and lieutenant governor have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of "qualifying contributions" and adhere to various other restrictions. *See* 17 V.S.A. §§ 2851-2856. These provisions are not at issue in this case.

evidence at trial and interpretative guidance provided by the Vermont Secretary of State, who is charged with administering the Act, supports a broad reading of the term "expenditure." P.A. 211a-219a.

Act 64 thus treats all manner of typical grassroots campaign activities, such as a candidate's use of her own car and food provided by supporters at "meet the candidate" events, as campaign expenditures that count toward the applicable spending limits. Candidates, therefore, as well as their volunteers, may not drive their personal vehicles for campaign purposes without accounting for the miles driven and treating the costs of that driving as a campaign expenditure. P.A. 229a-232a, 241a-242a. The use of personal phone lines, the value of donated office space or professional services, and the costs of complying with the law, are all considered to be "expenditures" under the Act. P.A. 225a-226a, 241a-242a. The spending limits – and the broad definition thereof – apply equally to candidates who exclusively use personal funds to finance their campaigns. 17 V.S.A. § 2805a(a).

Related Expenditures. Vermont's spending limits must also be reviewed in the context of the "related expenditure" provision, which counts certain expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (to be counted against the candidate's permissible budget). 17 V.S.A. § 2809. Spending is "related" when it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." 17 V.S.A. § 2809(c). The broad definition of "expenditure" applies to related expenditures as well, and the language requiring intentional "facilitation," "solicitation" or "approval" has been given a broad

interpretation by those charged with enforcing the act. P.A. 222a-223a, 308a-312a. *See* Regulation of Related Expenses, Regulation 2000-01 (Vt. Sec'y of State May 15, 2000) (Ex. II, E-0741)[2]. Spending by individual supporters may be treated as a "related expenditure" when it exceeds $50. 17 V.S.A § 2809(b).

The related expenditure provision prohibits a candidate's political party from working with the candidate whenever expenditures exceed the applicable expenditure and contribution limits. For example, a political party that has contributed the maximum $400 to its candidate for Governor cannot spend any more on related expenditures. Similarly, a political party cannot undertake any related expenditures on behalf of its candidate if the candidate has exceeded the applicable expenditure limit. Additionally, Act 64 creates a presumption that all political parties' and political action committees' expenditures that primarily benefit six or fewer candidates are, in fact, "related" expenditures – and therefore count as both contributions and candidate spending – even in the absence of any indication that such expenditures were made in coordination with any candidate. The presumption is subject to rebuttal in an enforcement proceeding. Candidates (or their opponents) may also bring a petition in state court seeking a determination as to whether particular third party expenditures should be considered "related," 17 V.S.A. § 2809(e), but any finding on such petition is not binding in a later enforcement proceeding. *Id.* Moreover, the cost of rebutting the statutory presumption is charged against the candidate's spending limit – even if the candidate succeeds in establishing that the presumption does not apply. P.A. 225a-226a.

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[2] References to trial exhibits are to the bound volumes I through VIII supplied to the Court of Appeals.

Contribution Limits. Act 64 also limits the size of contributions that candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than $200 from a single source, political party or political action committee. 17 V.S.A. § 2805(a). Slightly higher limits apply to candidates for state senate or county office ($300) and candidates for statewide office ($400). *Id.*[3] For the purpose of all these contribution limits, a political party's state, county and local branch (and national and regional affiliates of the party) count as a single unit. 17 V.S.A. § 2801(5). These limits apply to all cash, in-kind, and "related" contributions, following the broad definitions described above. The single limit applies during an entire 2-year general election cycle whether or not the candidate faces a primary. 17 V.S.A. § 2805(a).[4]

B. The Effects of Act 64

The evidence in this case regarding the methods, tactics, and costs of running an effective campaign for office in Vermont is detailed and specific. Plaintiffs introduced evidence from candidates, campaign managers, consultants, and experts. These witnesses based their testimony on broad experience in running statewide and legislative races in Vermont. George McNeil, for instance, was executive

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[3] Political action committees and political parties may accept no contribution greater than $2,000. *Id* The court upheld these limits. Petitioners are not seeking review of that holding.

[4] Act 64 also limits to 25% the amount of money candidates and political organizations can raise from out-of-state sources. 17 V.S.A. § 2805(c). The Second Circuit unanimously affirmed the district court's ruling that this provision was unconstitutional and no party has sought review of that issue in this Court.

director of the Republican Legislative Elections Committee, through which he advised dozens of candidates. He also worked on numerous Vermont legislative campaigns as chairman of a county Republican Committee. Tr. II-45. Steve Howard served as director of the House Democratic Committee and worked with numerous candidates in addition to his own campaigns for both houses of the legislature and for statewide office. Tr. IV-141-158. Mark Snelling played major roles in over a dozen statewide campaigns for lieutenant governor, governor, and Congress. Tr. I-22-25. Darcy Johnston managed the re-election campaign for Senator James Jeffords in 2000, and has extensive experience raising campaign funds in Vermont. Tr. I-73-75. Pat Garahan had extensive knowledge and experience regarding all levels of Vermont campaigns from his position as chair of the Vermont Republican State Committee. Tr. I-150-51. Kathy Summers was uniquely qualified to describe the impact of Act 64 on state-wide campaigns because she was managing the campaign of a gubernatorial candidate, Ruth Dwyer, in 2000 at the time of trial, and had witnessed this impact first-hand. Tr. IV-78-89. McNeil, Howard, Snelling, Johnston, Garahan, and Summers all testified that Act 64's spending and contribution limits had and would have severe adverse effects on the ability of candidates to mount effective campaigns, particularly in competitive races.

While most candidates run campaigns to win, an "effective," "competitive," or "successful" campaign cannot be solely defined by whether a candidate wins or loses a particular race; rather, an "effective" campaign can be objectively measured in terms of the ability of the candidate to communicate her message to the electorate. Tr. I-95-96; Tr. II-71; Tr.-IV-80, 106. According to plaintiffs' witnesses, a candidate is able to mount a "real" or "effective" campaign when she is able to communicate effectively to a large percentage of potential voters the candidate's name,

something about the candidate as a person, the candidate's positions on key issues, and some contrast of the candidate's positions with her opponent's. Tr. I-95-97; Tr. IV-80; Tr. II-71. In addition, an effective campaign must also have sufficient resources to respond to particular opponents, counter potentially unfavorable press coverage, and react to issues that may arise late in a campaign. Tr. II-126. Using these criteria, and taking into account various factors including the size of the district, density of population, available media outlets, and other factors, Tr. II-72, plaintiffs' witnesses consistently testified that it would be impossible, in many races, to run an effective campaign under Act 64's spending limits. This is especially true when the expanded definition of an "expenditure" is taken into account. *See* P.A. 234a-235a.

One of the most effective means of communicating with voters is through paid mass media communications. In Vermont house and senate races these are primarily direct mail and newspaper advertisements, Tr. IV-150-156, while in statewide races, radio and television commercials are of more importance. Tr. I-100-112. The State of Vermont's witness, pollster Celinda Lake, noted that a substantial portion of Vermonters receive their information about candidates through political advertising, which they view to be important or very important in deciding how to vote. Ex. III, E-0851. As such, a candidate for state representative will be severely hampered by the spending limits (only $2,000 for a house race), which could prevent the candidate from sending even a single mailing to all voters in her district. Tr. III-11-16; Tr. IV-151-54.

Plaintiff Neil Randall, the only Libertarian in the State House at the time of trial, spent approximately $3,735 in a hotly contested race in 1998 that included a contested primary. Tr. IV-227-236; Tr. II-10. He testified that he would be unable to run an effective campaign under Act 64's limit, because it would not allow him to place as many

advertisements and make as many mailings as were necessary in this district. Tr. IV-233-40. Randall testified that the spending limits' effects are exacerbated by the application of the two-year election rule. A candidate involved in a contested primary – as Randall was – needs to spend considerably more than an opponent who faces no opposition in the primary. *Id.* at 231-240.[5] Similarly, Steve Howard testified, based on his own experience running several campaigns, that it takes approximately $4,000 to $6,000 to run an effective house campaign in many districts and much more for a senate campaign. Tr. IV-156-171. In 1998, he spent over $24,000 in his own unsuccessful bid for the State Senate in Rutland County, where the Act 64 limit is $9,000. Tr. IV-162-163. John Patch corroborated this testimony, noting that to run an effective Senate campaign in Chittenden County, a challenger would need to spend at least $25,000. Tr. II-182.[6]

The evidence showed that the low cost campaign methods favored by Act 64's supporters, such as traditional door-to-door campaigning, are difficult in some geographic regions and might be impossible for a candidate who holds another job or for one with a disability. *See* Tr. III-32; IV-234. Many people are not home when candidates visit, and given the volume of potential door-to-door visits, it is

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[5] Plaintiff Steve Howard testified that he chose not to run for Auditor of Accounts in 2000 because he would have faced a tough primary that would have left him without sufficient resources for the general election. Tr. IV-177-78. John Patch, then chair of the Democratic Party in Vermont's most populous county, testified that for this reason contested primaries would be avoided in his district through self-selection, targeted recruiting, and subtle arm-twisting. Tr. II-185-89.

[6] Chittenden County is the state's largest district, with a population of approximately 150,000. Tr. II-181. Under the Act, a non-incumbent senate candidate in Chittenden County can spend no more than $16,500 for the 2-year election cycle. 17 V.S.A. § 2805a(a)(4). A state's attorney or sheriff candidate is limited to only $4,000, or less than three cents per resident. *Id.*

impossible for a candidate to spend any type of quality time with the voters at each home. Tr. I-103-04; Tr. IV-166-168. In addition, candidates have only minimal control over "free" coverage in the news media. Their events are often not covered, and when they are, many candidates must spend extra money on paid advertising to overcome distorted or unfavorable coverage. Tr. V-75; Tr. I-106-107; Tr. IV-166-67. This is especially true for candidates who are challengers or "nontraditional," for example, openly gay candidates. Tr. IV-171-77.

Plaintiffs' witnesses also evaluated the available statistical data and experience from previous election cycles to gauge the impact of the new campaign finance restrictions. Each of these witnesses recognized that, because there are many uncontested races and straw candidates, Tr. III-37, evaluating the real effect of Vermont's Act 64 requires a focus on spending data from competitive races. Tr. II-73; Tr. VIII-139-40. Focusing on the average amount raised and spent by *all* candidates does not gauge the effect of Act 64 on candidates most in need of the resources necessary to spread their message. Tr. VIII-150-151; Tr. X-154; Tr. IV-17.[7] Nonetheless, the state justified its claim that Act 64's limits would not harm candidates by providing only mathematical averages of *all* candidates for legislative office, including approximately 100 candidates for the house who filed no campaign finance report at all because they neither raised nor spent more than $500. Ex. III, E-0975-79.

The evidence showed that Act 64's spending and contribution limits have their most dramatic, negative impact on challengers in competitive races. Plaintiffs' expert Clark Benson analyzed the contribution and expenditure data for

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[7] Indeed, experts for both the plaintiffs and the defendants agreed that examining data for targeted competitive races gives more relevant information than the average for *all* races. Tr. IV-17; Tr. VIII-150-151; Tr. X-154.

candidates for Vermont senate and house, including the loss of financial resources that would have occurred as a result of Act 64. Ex. VII, E-2354-75. Pat Garahan, the chairman of the Vermont Republican State Committee, identified the races that were considered most competitive, Tr. I-196-97, and George McNeil identified which of the candidates in competitive races would not have been able to run an effective campaign as a result of Act 64. Tr. II-60, 74-97, 99-102. Mr. McNeil's testimony shows that the results of Act 64 would be devastating to the ability of candidates, particularly challengers in competitive races, to mount effective campaigns. *Id.*; *see also* Ex. VII, E-2360, E-2490, E-2501, E-2505, E-2510, E-2528, E-2546. This testimony also highlights the unique and idiosyncratic aspects of running a campaign in different Vermont legislative districts, and shows that Vermont's "one-size-fits-all" approach to campaign regulation will prevent many candidates from campaigning as they wish, and must, to reach voters in their districts.

Similar evidence was presented regarding Act 64's limitations on statewide candidates. Darcy Johnson, Mark Snelling, and William Meub (who was a candidate for governor at the time) all testified that Act 64 would have devastating effects on the ability of statewide candidates to run effective campaigns. Tr. I-22-72, 113-119; Tr. IV-24-78. Gubernatorial candidates have regularly exceeded the $300,000 limit: as Judge Winter noted in his dissent below, the major party candidates in Vermont's last two gubernatorial elections spent double or close to triple this amount. P.A. 239a.[8] In the 2002 race for lieutenant governor,

[8] The courts below discussed gubernatorial elections in only the most general terms. Overriding issues of the day, such as education finance or civil unions, affect the manner, intensity and cost of these campaigns, which are often hotly contested. P.A. 237a-240a. In 2000, each major party candidate spent approximately $900,000, and even a third party candidate spent more than the $300,000 allowed by the Act. In 1998,

both major party candidates and a third party candidate exceeded the limits by 63%, 40%, and 38%, respectively. *Id.*

Plaintiffs' witnesses testified similarly that the $200-$400 contribution limits would hamper campaigns in competitive elections. The campaign manager for Ruth Dwyer's campaign for governor testified that Act 64's contribution limits were having a devastating impact on her ability to raise funds. Tr. IV-83-92. Had these limits been in effect in 1998, the contribution limits would have prohibited over 40% of the funds contributed to the major party challengers for governor and lieutenant governor, 36% of the funds raised by non-incumbents in senate races, and 25% of the funds contributed to non-incumbents running for house seats. Ex. III, E-970, E-976, E-978. In the most competitive legislative races targeted by political parties, many candidates would have lost half their funds. Neil Randall explained that the reduced contribution limits affect non-mainstream candidates the hardest. The Libertarian Party must draw from a smaller pool of potential contributors and thus seek larger donations from individuals within that pool to get its message out to potential supporters. Tr. IV-244-45.

In the 1998 election, challengers in eleven of the fourteen competitive state senate races targeted by the Vermont Republican State Committee would not have been able to run competitive campaigns had Act 64's $300 candidate contribution limit been in effect. Tr. II-74-92, 99-102. These candidates would have lost between $3,150 and $6,900 in raw dollars and 13% to 43.7% of their total

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Governor Dean spent $657,065 to win re-election. As far back as 1990, the late Governor Richard Snelling spent $447,478; in the 1988 election, Governor Madeleine Kunin spent even more – $639,863. In the most recent election, incumbent Governor Jim Douglas spent $681,662 against challenger Peter Clavelle, who spent $502,537. Douglas spent nearly twice that amount – $1,124,519 – when the office was open in 2002. *See* Vt. Sec'y of State, Historical Campaign Finance Database, *at* http://www.sec.state.vt.us/seek/fin_seek.htm (last visited Dec. 8, 2005).

contributions. Ex. VII, E-2354-59.[9] In the 1998 campaigns for the Vermont house, fifteen of seventeen candidates in competitive races identified at trial would not have been able to mount an effective campaign had the new $200 candidate contribution limit been in effect. These candidates would have lost between $550 and $3,761 in raw dollars and 8.7% to 54.8% in total funds because of Act 64. Ex. III, E-232-75. These house candidates would have been forced to forego substantial communications with voters had they been limited by Act 64, Tr. II-81-95, and would not have been able to make up for the contributions lost to the new limits through additional fundraising efforts. Tr. II-99-100.

In the only election completed under the Act 64 contribution limits before the trial below was held, Kurt Wright unsuccessfully challenged the incumbent mayor of Burlington in 1999.[10] He testified that Act 64's $200 contribution limit severely restricted his ability to raise funds, and that he could have raised 50% more under the old limits. Ex. VIII, E-3052-54. This loss of funds forced Mr. Wright to limit his communications with voters. He had to cancel a crucial direct mail effort and also reduced his use of radio and cable television. He was unable to pay staff to coordinate volunteers. Ex. VIII, E-3052.

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[9] The losses to these candidates were actually underestimated by plaintiffs' expert witness, Clark Benson, who treated each political party organization as a separate source, able to make a full contribution. In fact, under the "single source rule" all branches of a political party are treated as one source and in the aggregate can contribute only up to the single limit set by Act 64. 17 V.S.A. §§ 2801(5), 2805(a).

[10] The candidates for local office are constrained by the $200 contribution limit, 17 V.S.A. § 2805(a), but Act 64 does not contain any expenditure limits for mayoral, town or city offices.

C. The Proceedings Below

Spending Limits. The district court enjoined enforcement of candidate spending limits on the strength of *Buckley*. The Court of Appeals divided 2-1 on this critical issue. This decision is directly at odds with decisions of the Sixth and Tenth Circuits. *See Homans v. City of Albequerque*, 366 F.3d 900 (10th Cir. 2004); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998). The panel majority concluded that this Court's holding in *Buckley* "does not operate as a per se bar to campaign expenditure limits; rather, *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests." P.A. 91a.

The majority found that Vermont's spending limits were supported by two government interests that it regarded as compelling, at least in tandem: limiting the time that candidates spend on fundraising and addressing the corrosive effect of public cynicism on the electoral process, which the court characterized as a form of corruption. P.A. 144a-146a.

The majority next turned to the issue of whether the spending limits established by Act 64 allow for "effective advocacy." Using a test developed in the contribution limit context, the court found that the expenditure limits were not "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." P.A. 152a-157a (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000)). Although the Court of Appeals recognized that there was conflicting evidence submitted at trial, it reviewed historical data from "average" races in which spending was reported under the prior law, and found many candidates spent within the limits of the new law. Thus, according to the majority below, most candidates would not be hampered by the new limits. P.A. 153a-154a.

Finally, the majority considered whether the Act's expenditure limits were narrowly tailored to advance the

State's asserted interests. Because it could not determine whether other, less restrictive alternatives could achieve the same goals of preserving candidate time and diminishing public cynicism, the court remanded the case to the district court for further proceedings. P.A. 164a-168a.

Judge Winter forcefully dissented from both the majority's assessment of the evidence and its legal conclusions. P.A. 190a-194a. At the most fundamental level, he disagreed with the majority's view that the constitutionality of spending limits remains an open question after *Buckley*. P.A. 207a, 258a, 265a. In addition, he noted that the record did not, in fact, support the majority's assertion that fundraising in Vermont was unduly burdensome on candidates and officeholders. The only evidence presented on this issue was purely anecdotal and described brief periods of time or the general distaste that some candidates may have for fundraising. *E.g.*, Tr. IX-151. As Judge Winter recognized, it is easy to state that candidates spend too much time fundraising, but "it is not a testable proposition." P.A. 274a.

Judge Winter also sharply criticized the majority's reliance on "average" spending to determine whether Vermont's spending limits would impair a candidate's ability to engage in "effective advocacy," since the use of an average inevitably obscures the critical difference between contested races and uncontested races, and favors incumbents. P.A. 236a-240a.[11] Additionally, Judge Winter

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[11] Act 64 does attempt to ameliorate the incumbent's advantage by providing that incumbents running for re-election may only spend 85% or 90% of the standard limits, depending on the office sought. 17 V.S.A. § 2805a(c). The evidence at trial showed that the legislature chose these percentages arbitrarily, with no empirical basis. Tr. VII-98-100; Tr. X-99. Circuit Judge Jacobs referred to this provision as a "fig leaf" that "just shows that the legislature understood that offense is better than defense; not a word in the record suggests that this marginal differential is sufficient to overcome the numerous and powerful advantages of

noted that the majority's comparison with historical spending rates failed to take into account the expanded definition of an "expenditure" under Act 64, including related expenditures and the costs of compliance. P.A. 233a-235a. Judge Winter pointedly disagreed with the majority that the test for effective advocacy developed in the contribution limit context – the "level of notice" standard – had any applicability to the constitutionality of spending limits. Where a direct restriction on speech is concerned, the First Amendment requires that a candidate be allowed to achieve more than just a "level of notice." P.A. 282a-285a.

And, unlike the majority, Judge Winter saw no need for a remand to explore less restrictive alternatives. That issue was decided by *Buckley*, which held that spending limits are not the least restrictive means of advancing the government's interest in preventing corruption or its appearance. 424 U.S. at 58-59. Judge Winter explained, moreover, that it was "self-evident" that the State could, if it chose, promote its asserted interests through "a combination of public and private funding with low contribution limits." P.A. 193a-194a, 292a, 300a.

Related Expenditures. The related expenditure provision establishes a statutory presumption that certain independent expenditures by political parties and political committees are coordinated with the candidate. They are automatically treated as contributions to the candidate and also count against the candidate's expenditure limits. § 2809(d) The burden rests with the candidate (or contributor) to prove otherwise. *See* 17 V.S.A. § 2809(e) (civil proceedings in state court); § 2806a (civil investigative powers of the state); § 2806 (criminal penalties for failure to report). The district court upheld the related expenditure

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incumbency." P.A. 339a; *see also* P.A. 275a, 285a-286a (Winter, J., dissenting).

provision of § 2809(d) as to contributions, relying on the theory that the presumption of coordination could be rebutted. P.A. 85a. The district court struck down the provision treating related expenditures as candidate expenditures after deciding that limits on candidate expenditures were per se unconstitutional. *Id.*

A majority of the Court of Appeals found no constitutional problem with the related expenditure provision as applied to contributions, much for the same reason as the district court. Giving the statutory language a narrow reading, the court reasoned that a candidate could rebut the presumption of coordination in any enforcement proceeding by simply testifying that she had not "facilitated," "solicited," or "approved" the expense. P.A. 184a. However, the majority remanded the question of related expenditures as it affects a candidate's spending limit, because the district court, having held spending limits unconstitutional, had not separately analyzed this issue. P.A. 168a.

In dissent, Judge Winter would have found § 2809(d) unconstitutional because it places an undue burden on candidates to disprove coordination of independent expenditures under a regime in which the costs of defending oneself also count against the limits. P.A. 222a-228a. Judge Winter also found the narrowing construction adopted by the majority to be at odds with advice given by Vermont's Secretary of State, who is charged with administering the law. P.A. 225a, 308a-312a. As such, the related expenditure provision would work untold mischief and chill much protected political speech by requiring candidates, parties, and supporters to speak and act only at their peril. P.A. 222a-225a, 289a.

Contribution Limits. The district court upheld the contribution limits as to individuals and political committees, finding that they advanced the State's interest in preventing

corruption or its appearance. P.A. 52a-62a, 77a-80a. The court struck down the limits as applied to political parties, finding the $200, $300 and $400 amounts to be so low that they would essentially remove political parties from their traditional, historical role in elections. P.A. 72a-76a ("Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper."). The Court of Appeals, relying on *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 480-82 (2001) (*Colorado II*), felt there was no basis to distinguish between political parties and individuals or other organizations. P.A. 177a-181a. Accordingly, the court reversed the district court and upheld the constitutionality of all Act 64's contribution limits. P.A. 168a-181a.

In so holding, the court again relied on evidence from "average" contributions in prior elections. P.A. 170a. The court ignored plaintiffs' evidence that such mathematical averages mask the harm caused to many candidates, particularly in the most seriously contested elections and particularly to non-incumbents and "non-traditional" candidates. Chief Judge Walker, in his opinion dissenting from the denial of rehearing en banc, was especially critical of the court's holding in this regard. He characterized the contribution limits as "laughably low," and opined that these limits, when considered in combination with the Act's expenditure limits, "are set so low and in such a fashion that only a desire to protect incumbents can explain them." P.A. 330a-331a. Indeed, the court fails to even discuss the evidence showing that the contribution limits were adopted primarily to advance the State's goal of curbing campaign spending. *See* 1997 Vt. Laws Pub. Act 64, §§ 1(a)(4), (5), (10) (legislative findings).[12] Nor did the Court consider

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[12] The original version of the bill contained these contribution limits, but no mandatory spending limits. Ex. I, E-0001-0025. Nonetheless, then-Governor Howard Dean praised the bill because it "limits the amount of

whether existing limits were sufficient to further the state's anti-corruption interest. Before Act 64, candidates were limited to contributions from individuals of no more than $1,000 per election ($2,000 per cycle when a primary is held). 1988 Vt. Laws Pub. Act 263, § 3. There was no evidence at trial that these limits failed to deter corruption.

In reversing the district court's ruling on party contribution limits, the Court of Appeals overlooked the fact that the district court's validation of the Act's individual contribution limits was inevitably tied to that court's ruling that the limits on party contributions to candidates were unconstitutional. The district court's order allowed political parties to make larger contributions to candidates and thus moderated, to some extent, the effect of the low individual contribution limits. P.A. 72a-76a. Under the Second Circuit's ruling, however, even parties can give no more than the $200-$400 limits. This restriction arbitrarily deprives candidates of critical sources of campaign funds.[13]

SUMMARY OF ARGUMENT

Act 64 reflects the philosophy of its proponents that government ought to regulate political speech the way it regulates public utilities. P.A. 195a. The Act suppresses ordinary political activity at every level and represents a complete abandonment of the First Amendment's standard of

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money candidates can spend in both primary and general elections." Ex. III, E-0903. The record shows clearly that the legislative purpose was "to reduce and control expenditures on election campaigns" even before the spending limits were added to the bill. Ex. VIII, E-2839, E-2894 (testimony of principal legislative sponsor), *see Id.* at E-2813 (statement of legislative counsel).

[13] In contrast to the federal system, there is no separate allowance for coordinated expenses between political parties and their candidates. *See* 2 U.S.C. § 441a(d) (providing for coordinated expenditures by political parties over and above direct contributions made to a candidate).

a free, robust discussion in which citizens retain control over the quantity and range of debate on public issues in a political campaign. *Buckley*, 424 U.S. at 52-53. It is therefore not surprising that Act 64's expenditure limits were adopted as a vehicle to challenge *Buckley*'s central premise, that while it is permissible to limit campaign contributions, the expenditure of funds for core political speech cannot be restricted based on the government's conception of how much speech is needed. This Court has never retreated from *Buckley*, *see Colorado II*, 533 U.S. at 441, and there is nothing unique about Vermont elections that would support so radical a departure from the principles that emerged there. The arguments adopted by the Second Circuit were all explicitly rejected by the *Buckley* Court on a far more thorough record than that compiled here.

The Second Circuit attempted to avoid *Buckley*'s binding precedent by redefining the State's anti-corruption rationale in terms of public cynicism and the corrosive effects on the electoral process attributed to the need to raise campaign funds. The court asserted that *Buckley* had not fully considered this issue or the subsidiary issue of whether spending limits could be justified by the State's alleged interest in reducing the time spent on fundraising. In fact, *Buckley* speaks much more directly to these issues than the Second Circuit acknowledged. The *Buckley* Court categorically rejected the argument that the state has an interest in regulating the spending of money legally raised by candidates. 424 U.S. at 55-56.

No amount of "fine-tuning' will remedy the statute's restraint of core political speech. *Buckley* has already established that spending limits are not the least restrictive means of advancing the State's interest in preventing corruption or its appearance. *Id.* at 58-59. But even if the Second Circuit were correct that preserving the time of candidates and combating real or apparent corruption are sufficiently compelling interests to justify the burdens posed

by spending limits, Vermont's limits should still be struck down for lack of tailoring. Any expenditure ceiling – especially one that uses past average expenditures as the relevant guide – will necessarily restrict the spending of some candidates to ensure that other candidates are not outspent. This approach sweeps too broadly to withstand the "exacting scrutiny" required by *Buckley*.

Act 64 also seeks to encompass many independent expenditures within its spending and contribution limits. Pursuant to 17 V.S.A. § 2809, political parties or committees that engage in independent expenditures that benefit six or fewer candidates must report those expenditures as contributions. This related expenditure provision presumes these independent expenditures are the candidate's own speech and counts them as both contributions to the candidate and expenditures by the candidate – subject to the relevant limitations. Although the presumption can be rebutted, it places an undue burden and expense on candidates to disassociate themselves from independent expenditures over which they have no control. This approach to regulating independent expenditures was rejected in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (*Colorado I*). Conversely, the Act imposes no limit on "unrelated" independent expenditures, meaning that a candidate's own speech can be overwhelmed by non-candidate speakers in a constitutionally perverse form of speaker-based discrimination.

Finally, Act 64's contribution limits are so low as to raise the question whether they were adopted to combat real or perceived corruption, or whether they were adopted for the impermissible goal of reducing overall campaign spending. Nothing in the record suggests that the modest pre-existing limits were ineffective. The completely unjustified adoption of the limits on a per cycle basis raises the additional prospect that the limits were adopted by the

legislature out of self-interest. Moreover, by treating political parties and committees as if they were individual contributors, the limits trample the weighty associational interests at stake when individuals come together for a common political purpose. As the record demonstrates, Act 64 will prevent many candidates from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

ARGUMENT

I. ACT 64'S EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT

Under any conception of the First Amendment, Act 64's limits are unconstitutional. The limits cannot withstand the "exacting scrutiny required by the First Amendment." *Id.* at 16, 44-45. *Buckley* rejected, in the most explicit terms, the contention that the Government may limit the amount of political speech by candidates and ordinary citizens. Act 64's limits take aim at core political expression on the theory that the state has the right to determine how much political speech is necessary and appropriate. The interests advanced in support of the statute are at best a reformulation of the interests identified and rejected in *Buckley*. Those arguments are no more persuasive now than they were when the Court first rejected them in 1976.

Even if Vermont can show a compelling interest that is distinct from those considered in *Buckley*, Act 64's limits are so low that they cannot reasonably be said to be narrowly tailored. The test adopted by the Court of Appeals – whether the limits are so low that they prevent "effective advocacy" by "driv[ing] the sound of a candidate's voice below the level of notice" – is not applicable to direct restraints on speech, much less core political speech. At a minimum, the First Amendment requires that a candidate be allowed to achieve more than just a "level of notice."

A. *Buckley* Categorically Rejected Limits on How Much Candidates Can Spend to Promote Their Own Candidacies

Buckley held, without qualification, that government may not limit campaign expenditures by candidates for electoral office. 424 U.S. at 45. Act 64 limits such expenditures, notwithstanding *Buckley*. Indeed the proponents of Act 64 never doubted its unconstitutionality and enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*. P.A. 202a n.2. Act 64's limits on expenditures violate the First Amendment because they limit a broad spectrum of political speech and activity.

The activities limited by Act 64 are the ordinary stuff of democracy and the core conduct protected by the First Amendment. There is "practically universal agreement that a major purpose of [the First] Amendment was to protect" political speech. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Candidate speech is entitled to special protection not just because candidates have an individual right "to engage in the discussion of public issues and vigorously and tirelessly to advocate [their] own election and the election of other candidates," *Buckley*, 424 U.S. at 52, but also because it is vital to the community's interest in appraising a candidate's qualifications for public office. As the Court explained in *Buckley*, "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 52-53. This exchange between candidate and voter is at the heart of democratic self-governance.

Because money is needed for access to the means of communication, *Buckley* held that any limit on the use of money for political speech is a limit on that speech. 424 U.S. at 19. Political speech without an audience is not worth the

effort. Political speakers must go to where voters are or speak through a medium that voters watch or hear. As explained by Judge Winter in dissent below, a candidate who has reached Act 64's limits on expenditures may not even drive the family car to a town green to make a speech. She is as effectively barred from speaking, as she would be if the law flatly prohibited it. P.A. 197a. In *Buckley*, the Court stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.

424 U.S. at 19.

It has been nearly thirty years since this Court held in *Buckley* that political spending is protected First Amendment activity. The starting point for every subsequent decision by the Court has been to determine whether the law at issue regulates political contributions or political expenditures. The latter are entitled to greater constitutional protection for the reasons set forth in *Buckley*: "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 20. In contrast, expenditure limits place direct restraints on speech. *Id.* at 19. Because of these

differences, the Court has since explained, "we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits." *Colorado II*, 533 U.S. at 441-42 (internal citations omitted).

Thus, while the Court has held that the prevention of corruption or the appearance of corruption constitutes a sufficient governmental interest to limit contributions to candidates, *see Buckley*, 424 U.S. at 25-28, it has rejected the argument that the spending of money legally raised by candidates poses a risk of corruption. *Id.* at 55-56. The Court found the government's interest in preventing corruption or its appearance was largely alleviated by reasonable limits on contributions and disclosure requirements. *Id.* at 58-59. With sufficiently low contribution limits, the Court suggested the danger of corruption would disappear altogether. *Id.* at 56 n.64 (quoting, with approval, a circuit court dissenter's position that "[i]f a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none.").

The Court also dismissed the argument that the interest in "reducing the allegedly skyrocketing costs of political campaigns" is compelling or sufficient enough to justify restrictions on campaign spending:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57.

Nothing has changed since *Buckley* to alter this Court's fundamental conclusion that expenditure limits "place substantial and direct restrictions on the ability of candidates . . . to engage in protected expression." *Id.* at 58-59. In reaching this conclusion, the *Buckley* Court relied on data showing how the proposed federal limits would have resulted in a reduction in the scope and spending of a number of House and Senate campaigns and substantially limited the overall expenditures of the two major-party presidential candidates. *Id.* at 20 n.21, 55 n.62. The record in this case shows that the expenditure limits imposed by Act 64, if implemented, would have at least as significant an impact in both legislative and statewide elections as the statute at issue in *Buckley*. P.A. 237a-240a.[14]

The Second Circuit did not dispute this evidence or the significance of similar evidence in *Buckley*. Instead, it reframed the issue to ask whether the Vermont limits are so low that they prevent "effective advocacy" by "driv[ing] the sound of a candidate's voice below the level of notice." P.A. 156a-157a. (quoting *Shrink*, 528 U.S. at 397). Additionally, the court relied on average past expenditures as the relevant guide for establishing the threshold "level of notice." *Id.* The court then adopted the district court's finding that Act 64's limits on campaign expenditures were based on past experience and, with limited exceptions, are substantially the same as "average" expenditures by candidates in the past. *Id.* Based on these findings, the Second Circuit concluded that the limits are not so "radical in effect" that they prevent candidates from "amassing the resources necessary for effective advocacy." *Id.*

The problem with the approach taken by the Second Circuit is that the "effective advocacy" standard utilized in

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[14] *See also* pp. 9-12 *supra*.

the context of cases discussing contribution limits, *Shrink*, 528 U.S. at 395-96, has no place in the different context of expenditure limits under this Court's jurisprudence. Applied to expenditure limits, the "effective advocacy" standard is essentially a one-size-fits-all approach that allows government to silence candidates above a minimum level. Importing the *Shrink* standard into the expenditure limit context disregards the sharp contrast this Court has drawn between expenditure limits and contribution limits. Whereas contribution limits "entai[l] only a marginal restriction on the contributor's ability to engage in free communication," *McConnell v. FEC*, 540 U.S. 93, 134-35 (2003) (quoting *Buckley*, 424 U.S. at 20), "limitations on "expenditures [are] direct restraints on speech," *Id.* at 120. The decision in *Shrink* stands as a safeguard against unreasonably low contribution limits that might prevent otherwise viable candidates from raising enough money even to be noticed. That decision, however, does not stand for the different proposition that candidates who have raised legal contributions can be prevented from spending more than what the government believes is needed to reach the minimum "level of notice." *Buckley* rejected this proposition outright. 424 U.S. at 56-57.

Finally this Court rejected the argument that the government's interest in equalizing the financial resources of candidates in order to level the playing field justifies limiting the amounts that candidates for office may spend to promote their candidacies. *Id.* at 45, 54, 57. The arguments raised by the Government in *Buckley* about the inequalities of private economic power were not an explicit factor in the decision below, but these arguments are implicit in the court's adoption of the "effective advocacy" standard for measuring the burden Act 64 places on candidates.[15] A state that wishes

[15] The defendants and the intervenors are more direct. They explicitly rely on this argument in their Conditional Cross-Petition for Writ of

to facilitate the campaigns of under-funded candidates can adopt a public financing scheme. Expenditure limits, by contrast, are designed to inhibit speech, not to enhance it.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.

Id. at 48-49 (internal quotation marks omitted.)[16]

Buckley is a deeply entrenched part of our political landscape. In case after case, the Court has rejected government efforts to impose expenditure limits on candidates, ordinary citizens, or groups. It has stated the clear and unequivocal rule that the Constitution "grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures." *Colorado I*, 518 U.S. at 618 (rejecting attempts to regulate political party expenditures); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (striking down a segregation requirement for political expenditures by non-profit organizations); *FEC v. Nat'l Conservative Political*

Certiorari (No. 1697) at 4 (incorporating arguments from intervenors' response and partial opposition brief).

[16] The Court has also stated that "the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S at 56-57.

Action Comm., 470 U.S. 480 (1985) (striking down expenditure limitations on political action committees); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 767 (1978) (striking down a statute forbidding banks and business corporations from making certain political expenditures).[17]

There is nothing unique about Vermont elections that supports such an abrupt and radical departure from the principles established in *Buckley*. The Court of Appeals' decision erroneously proceeds on the assumption that the First Amendment judgments made in *Buckley* are no longer valid. Just the opposite is true. The Court's campaign finance jurisprudence on this issue has been remarkably constant for three decades and has unfailingly affirmed the holding in *Buckley* on the unconstitutionality of expenditure limits.

B. Even if *Buckley* Does Not Categorically Reject Mandatory Expenditure Limits, Act 64's Limits Violate the First Amendment

The Second Circuit correctly framed its First Amendment analysis as involving a content-based regulation of speech because Act 64 targets expenditures made "for the purpose of influencing elections." P.A. 118a-119a (citing *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (treating election provisions as content-based because "whether individuals may exercise their free speech rights . . . depends entirely on whether their speech is related to a political campaign")). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In addition, Act 64's limitations depend on the identity of the speaker, which is an independent basis for applying strict scrutiny. *See Belotti*, 435 U.S. at 785. That is

[17] The only direct restraint of political expenditures thus far upheld by the Court involved political expenditures by corporations and labor unions. *See Austin v Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell, supra*.

especially true in this context. Only candidates are subject to the expenditure limits. As a result, other unregulated speakers are allowed to say more about the candidates than the candidates themselves.

To uphold a content-based restriction on speech, the Government must demonstrate a compelling state interest to support the restriction, and show that the restriction is narrowly tailored to advance that interest. *Austin v. Mich. Chamber of Commerce,* 494 U.S. at 657. Act 64 fails that test.

1. Act 64's Expenditure Limits are not Supported by a Compelling Interest

Act 64 was adopted as a broad-based regulatory scheme intended to reduce campaign spending and overturn *Buckley*. Its asserted goals were to restore public confidence in government and reduce the time spent on political fundraising.[18] The Act's fatal flaw is to presume that less political advocacy is better than more, and that the government knows best how candidates should run their campaigns. This Court has consistently rejected that paternalistic assumption. *Buckley*, 424 U.S. at 57.

In an effort to distinguish its decision upholding expenditure limits from what has been understood for thirty years as the contrary holding in *Buckley*, the majority below argued that the *Buckley* Court had not considered the specific state interests asserted by Vermont in this case. It then identified those interests as preventing public cynicism and the corrosive effects on the electoral process attributed to the need to raise campaign funds. These interests were broadly envisioned by the court to include eliminating special access or the appearance of special access of donors to office-holders, reducing the influential or agenda-setting effect of

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[18] This latter interest is undermined, of course, by the Act's unreasonably low contribution limits. *See* p. 33, *infra*.

"bundled" contributions, freeing candidates from the rigors of fundraising, and increasing citizen confidence in the electoral process. Fairly read, however, *Buckley* correctly rejected all of these interests as insufficient to justify expenditure limits on the political speech of candidates, parties, and involved citizens.

As described in Judge Winter's dissenting opinion below, the *Buckley* Court had before it a full record of campaign practices and abuses, including the issue of special donor access – when it declared expenditure limits unconstitutional. P.A. 259a-262a. As Judge Winter further observed, having held that neither corruption nor the appearance of corruption was sufficiently compelling to justify expenditure limits, the *Buckley* Court hardly had to go on to say that access, or the appearance of access, was also not a compelling justification to limit expenditures. P.A. 259a. Similarly, the practice of "bundling" or pooling contributions was relied on by the proponents of the federal law at issue in *Buckley* as evidence of improper influence by particular industry groups and was before the Court in *Buckley*. 424 U.S. 32-34 nn.35-40. By comparison, Act 64's record is remarkably weak. The claims of widespread improper influence are not supported by the record here. To the contrary, it is clear from the record that Vermont elections are relatively low-budget affairs that hardly leave candidates obsessively dependent on contributors to offset skyrocketing campaign costs.

The Second Circuit nonetheless relied on the corruption rationale by linking it with what it characterized as a separate state interest in freeing candidates from the time-consuming demands of fundraising. The idea is that the extra time will be spent conferring with "ordinary citizens," rather than the so-called "special interests" upon which candidates are alleged to be obsessively dependant. As an initial matter, the record does not support the State's contention that fundraising is extremely burdensome for

Vermont candidates. There is absolutely no evidence in the record quantifying the time spent by candidates, nor is the proposition self-evident. Indeed, if average past expenditures are any guide, it can hardly be said that candidates for Vermont's part-time legislature are preoccupied with raising large amounts of campaign funds.

The State's asserted interest in limiting campaign spending as a means of promoting equal access to public officials is likewise irreconcilable with *Buckley*'s holding that expenditure limits cannot be sustained as a means of deterring corruption. As Judge Winter observed: "Reducing bribes is generally regarded as a far more compelling interest than reducing phone calls." P.A. 259a. Moreover, there is nothing inherently improper or invidious when elected officials meet with representatives from industry groups and advocacy organizations like the NRA or AARP. Similarly, the *Buckley* Court was well aware of the argument, embraced by the Second Circuit, that politicians spend too much time on fundraising.[19] Analytically, those arguments are not legally distinct from the broader interest, rejected in *Buckley*, of controlling campaign costs. Doctrinally, the Court has held that the First Amendment denies government the power to determine that spending to promote one's political campaign is wasteful, excessive, or unwise. *Buckley*, 424 U.S. at 57. The time spent fundraising is an obvious, direct result of campaign costs and cannot serve as a separate basis for limiting campaign spending.

Even if the time-consuming nature of raising funds were a distinct state interest, Act 64 actually makes fundraising more difficult. The expenditure limits have been adopted in tandem with possibly the lowest contribution limits in the country. Limiting the size of individual

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[19] Judge Winter's opinion provides ample support for this point. P.A. 263a-265a (collecting citations to the record, the briefs of the parties, and the lower court opinion in *Buckley*).

contributions necessarily increases the amount of time that must be spent raising a particular amount of money. Vermont has manufactured the problem it now seeks to remedy. The majority below recognized that such low contribution limits would actually require candidates to spend more time fundraising, thus in a circular way justifying the Act's low spending limits as well. P.A. 150a-151a. In his dissent from denial of rehearing en banc, Chief Judge Walker recognized that a statute cannot be justified "based on problems that the statute itself creates." P.A. 331a.

Finally, some of Act 64's limitations on political advocacy are unconstitutional because no governmental interest has been offered to justify them. These include the two-year cycle for limits on expenditures (and contributions) and the imposition of expenditure limits on candidates' self-funded campaigns. Even accepting the reasons identified by the Court of Appeals as justification for Act 64's limits, a two-year cycle does not advance these interests. Collapsing primary and general elections under a single expenditure limit suppresses speech for no asserted reason. Additionally, no reason is given for applying expenditure limits to candidates who desire to fund their own campaigns. Such candidates are obviously not excessively dependent on interest groups and need not spend excessive time fundraising. Again, speech is suppressed for no reason. *See Buckley*, 424 U.S. at 44-45.

2. Act 64 is not Narrowly Tailored to Advance the Interests Asserted by the Legislature

Even if the Second Circuit were correct that the State had proven sufficiently compelling interests to justify the burdens posed by spending limits, the court unnecessarily remanded the case to determine whether the specific expenditure limits adopted by the legislature were narrowly tailored to serve those interests. As the Second Circuit itself

recognized, this inquiry is essentially twofold. First, the State must prove that the type of regulation chosen was the least restrictive – that is, that no other type of regulation could have advanced the interests asserted while impinging less on First Amendment rights. Second, the least restrictive alternative inquiry requires scrutiny of the basis for the particular spending limits chosen. P.A. 157a-158a.

Buckley already establishes that spending limits are not the least restrictive means of advancing the State's interest in preventing corruption or its appearance. 424 U.S. at 58-59. As *Buckley* explained, contribution limits and disclosure requirements are the "primary weapons" against the reality or the appearance of improper influence. *Id.* at 58. There is nothing in the record of this case to suggest that Vermont's contribution limits are not sufficiently low to dispel any possibility of corruption or its appearance. *See Id.* at 55 (holding that "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions," and therefore does not justify spending limits). Moreover, there is nothing in the record to suggest that disclosure of amounts and source of a candidate's campaign funds, in conjunction with appropriate contribution limits, and/or a form of public financing, would not adequately advance the State's interests.

Additionally, the Second Circuit erred in treating average past expenditures as the relevant guide for determining whether Vermont's current expenditure limits are narrowly tailored. First, the candidate disclosure reports filed under Vermont law for past elections vastly understate the level of spending under Act 64's two-year election cycle and its new, much broader, definitions of expenditures and related expenditures.[20] Even the Second Circuit recognized this. P.A. 163a n.23. For example, under prior law, there

[20] 17 V.S.A. § 2801 (3); *see* pp. 4-6, *supra*.

was no provision regarding related expenditures, and candidates routinely relied on support from political parties and committees. Under Act 64, the value of such support must be treated as a candidate expenditure. 17 V.S.A. §§ 2809(c)-(d). The value of these previously unreported expenditures itself makes past spending reports irrelevant.

Second, the use of average expenditures from past elections inevitably yields expenditure levels that strongly favor incumbents, whose official duties often overlap with their re-election efforts. Incumbents have political capital to spend that must be purchased or earned by their opponents. Incumbents also benefit from the adoption of the expenditure limits on a per-cycle basis, because they often do not face a primary opponent.[21]

Third, the average of past expenditures is calculated by including straw candidates, minor party candidates and legislative elections that were not seriously contested, or perhaps not contested at all – elections in which little communication took place and little was spent. Campaign finance reports of Vermont candidates provide ample evidence that in contested elections many candidates spent well in excess of Act 64's limits. P.A. 239a-240a. Of course, different legislative districts may require different modes of communication, which will, in turn, differently affect the cost of communications.[22]

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[21] The legislature's clumsy attempt to lessen the advantages of incumbency was both arbitrary and inadequate. *See* n. 11, *supra*.

[22] Even the slightly higher limits adopted for legislative candidates in multimember (at large) districts are irrational. In those districts, although candidates are permitted to exceed the limits established for candidates in single member districts, the extent to which they are permitted to do so is not directly proportionate to the size of their districts. 17 V.S.A. § 2805a(4) (candidates for state senator in single-member districts can spend $4,000, and candidates in multi-member districts can spend an additional $2,500 per additional seat); § 2805a(5) (candidates for state representative in single-member districts can spend $2,000, and candidates in two-member districts can spend an additional $1,000). The

Fourth, past averages have almost nothing to do with the communication needs in elections in which candidates strongly disagree over issues that divide large portions of the public and a clear-cut attempt is being made to alter governmental policies on those issues. It is the non-average election that is often the historic election, the one in which the outcome is heavily contested, the debate is most widespread, the public interest is at its highest, and the most money is spent. In dissent, Judge Winter makes all these observations to support his conclusion that average past spending has little relevance unless the goal is to disadvantage challengers. P.A. 235a-238a.

Finally, a remand to fine-tune the limits would be futile. Any ceiling on expenditures – especially one that uses past average expenditures as the relevant guide – will necessarily restrict the spending of some candidates to ensure that other candidates are not outspent. This approach sweeps too broadly to withstand the "exacting scrutiny" required under *Buckley*, since no amount of "fine-tuning" will remedy the statute's unconstitutional restraint of core political speech in those circumstances in which the candidate determines that further speech is necessary to fully convey his or her political message.

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candidate in a two-member district is trying to get votes from approximately twice as many voters as is the candidate in a single-member district, but is not allowed to spend twice the amount of money. There was no empirical basis for these provisions, which the legislature chose arbitrarily.

II. ACT 64'S TREATMENT OF INDEPENDENT EXPENDITURES AS CANDIDATE EXPENDITURES AND CONTRIBUTIONS VIOLATES THE FIRST AMENDMENT

Act 64 also seeks to encompass many independent expenditures within its spending and contribution limits. Pursuant to 17 V.S.A. § 2809, political parties or committees that engage in independent expenditures that benefit six or fewer candidates must report those expenditures as contributions. Under this "related expenditure" provision, these independent expenditures are regarded as the candidate's own speech and counted as both contributions to the candidate and expenditures by the candidate – and subject to the relevant limitations.

It is axiomatic that Supreme Court precedents prohibit limitation of independent expenditures. *See Buckley*, 424 U.S. at 45-47; *Colorado I*, 518 U.S. at 615-16. Because of the constitutional difference between independent expenditures and contributions, it is not constitutionally permissible for the State of Vermont to presume that the former is the latter by counting them as contributions. *Colorado I*, *supra*. Although the presumption is rebuttable, the burden is on the party or candidate to challenge it, and the litigation expenses also count against the candidate's expenditure limits. This Court has struck down similar presumptions because they subjected persons exercising First Amendment rights to potential litigation in which they would "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 (1988). Such a scheme "must necessarily chill speech in direct contravention of the First Amendment's dictates." *Id.* The effect of the statutory presumption is to place an undue burden and expense on candidates to disassociate themselves from independent expenditures over which they have no control. This approach

to regulating independent expenditures was rejected in *Colorado I*.

A political party that independently sends out a mailing endorsing its candidate for Governor, and costing a modest $500, will have exceeded the allowable contribution limit and be completely foreclosed from making any additional expenditures or direct contributions.[23] Both the party and the benefiting candidate are presumed to have violated the law and are subject to penalties of up to $10,000 per incident. 17 V.S.A. 2806 (b). The $10,000 penalty for violation of the expenditure or contribution limits "hovers over [candidates and political organizations] like the proverbial sword of Damocles" and imposes a heavy burden on political speech. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 881 (1997). A candidate who is not willing to risk prosecution is effectively silenced.

Moreover, the Act's presumption of coordination is by definition not narrowly tailored since the State's purpose is already served adequately by the same statute's provision that properly treats expenditures that are actually coordinated as contributions. 17 V.S.A. § 2809(c). The problem is aggravated by another provision of the Act that treats all the committees of a political party as a single entity for the purposes of the contribution limits. 17 V.S.A. § 2801(5). A town or county committee of a political party can make an independent expenditure for an amount near the contribution limit, choose not to rebut the presumption, and thereby bar every other town, county, state, and national committee of that political party from making a contribution of any size to that candidate. As the Court recently explained in striking a federal law that required political parties to choose between

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[23] Because the contribution limits are lower than the expenditure limits, treating "related expenditures" as contributions to the candidate is actually more restrictive than treating them as expenditures by the candidate.

independent expenditures and coordinated expenditures, and then treated all political parties as one for the purposes of the election: "[g]iven that provision, it simply is not the case that each party committee can make a voluntary and independent choice." *McConnell*, 540 U.S. at 218. To the contrary, the Court pointed out, "the decision resides solely in the hands of the first mover, such that a local party committee can bind both the state and national parties to its chosen spending option." *Id.*

In addition, the related expenditure provision violates the First Amendment by misattributing independent speech to a candidate who was uninvolved in its making. As the Eighth Circuit has held, such a presumption "eliminat[es] the independent nature of the speech and thus diminish[es] its value." *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 967 (8th Cir. 1999). For all the reasons advanced in Judge Winter's dissenting opinion, the related expenditure provision is also fraught with vagueness, uncertainty, and the potential for untold mischief. P.A. 223a-226a.

Vermont cannot rely on its related expenditure provision to accomplish indirectly what it is prohibited from doing directly – curtail expenditures made independently of the candidate and his campaign.

III. ACT 64'S LIMITS ON CONTRIBUTIONS BY INDIVIDUALS AND POLITICAL ORGANIZATIONS VIOLATE THE FIRST AMENDMENT

Campaign contributions advance political association by allowing individuals and groups to affiliate with political candidates and "enabl[ing] like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. Unlike restrictions on political expenditures, however, contribution limits have been treated

as "marginal" speech restrictions. *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). As a result, the Court has consistently applied less rigorous scrutiny to limits on how much individuals and organizations can contribute to political candidates. Contribution limits pass muster if they are "closely drawn" to prevent actual or perceived corruption. *Shrink*, 528 U.S. at 387-88. The "closely drawn" standard entails a two-part analysis. First, the Court must satisfy itself that the new limits are necessary to address these interests. Second, if satisfied that the pre-existing limits were inadequate, the Court must still determine whether the new limits are set at levels that prevent candidates from "amas[sing] the resources necessary for effective advocacy." *Id.* at 397. Although a court has no "scalpel to probe" whether a higher limit might serve as well as the one adopted, distinctions in degree can be significant when they amount to differences in kind. *Buckley*, 424 U.S. at 30.

Unlike limits that have been upheld elsewhere, Vermont's contribution limits are structured primarily to limit spending. There was no evidence that the pre-existing limits were inadequate to prevent corrupt practices or the perception that large, unregulated campaign contributions exerted a corrosive influence on Vermont politics. The limits are the lowest in the nation for elected state office and were established at levels that directly correspond to the expenditure limits. Some legislative candidates are limited to as little as $200 from any single source, including her own party, for an entire two-year election cycle, meaning that a contributor who gives her favorite candidate $200 in a hotly contested primary is prohibited from providing any new assistance to the candidate in the general election. Even gubernatorial candidates can accept only $400 every two years. Contributions from political parties are restricted still further in that the state, county, and town committees of a political party are treated as a single entity. Hence, the entire Republican, Democratic, and Libertarian Parties of Vermont,

with all their local committees, may only give $400 each to their respective gubernatorial nominees.

Act 64 will inevitably stifle speech and thwart the ability of many candidates to run effective campaigns. Instead of directly targeting contributions from the sources thought to exert improper influence, Act 64 takes aim at the modest contributions made by friends, business associates, political parties, and political committees that were permissible under the pre-existing limits. Even if Vermont has a sustainable interest in regulating contributions so broadly, there is no justification for enforcing the limits on an election cycle basis.

A. There is No Evidence That Would Justify Act 64's Exceedingly Low Contribution Limits

In *Buckley*, the Court upheld the $1000 per election limit on individual contributions to candidates for federal office as a permissible means of combating the potential for corruption. The limit approved by the Court focused precisely on the problem of large campaign contributions and the narrow aspect of political association where the actuality and potential for corruption had been identified in the record. Based on a similar record involving tens and hundreds of thousands of dollars in single-source contributions, the Court upheld comparable limits adopted by the Missouri legislature to address what was perceived by the public as "politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. No similar record exists in this case. The Vermont limits were not adopted in response to a system of unregulated and unrestrained campaign giving like those identified in *Buckley* and *Shrink*. Vermont's pre-existing limits were in effect for more than 25 years and worked remarkably well in a state where elections are relatively low-budget affairs. By some

measures, Vermont ranks 49th out of the 50 states in political spending. J.A. 40-43. The large contributors that the district court accepted at face value as poisoning the system do not exist.

The single interest identified by the Court as sufficient to justify contribution limits is the State's interest in preventing corruption or the appearance of corruption that may flow from large campaign contributions. *See Buckley*, 424 U.S. at 25-27; *Shrink*, 528 U.S. at 389-395. Plaintiffs recognize that there is no minimum number that is categorically suspect. However, limits that are (as adjusted for inflation) only a tiny fraction of those upheld in *Buckley* are low enough to raise the question whether they were adopted to combat real or perceived corruption, or whether they were adopted out of the impermissible goal of reducing overall campaign spending. The record certainly supports this inference. *See* n. 12, *supra*. Nothing in the record suggests that the modest pre-existing limits were ineffective. The adoption of the limits on a per cycle basis raises the additional prospect that the limits were adopted by the legislature out of self-interest. Vermont's limits differ from those approved in *Buckley* not merely in degree: rather, Vermont's limits impose an entirely different kind of regulatory regime – one that will prevent many candidates from raising needed campaign funds. *Buckley*, 424 U.S. at 21.[24]

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[24] When adjusted for inflation, and for the critical fact that the limits apply on a two-year election cycle basis, rather than per election, the limits amount to approximately 3.0 percent of the *Buckley* limits for Vermont House races, 4.5 percent for Senate races, and 6.0 percent for gubernatorial elections. Adjusted for inflation since *Buckley* was decided, Vermont's per-election individual contribution limits respectively equate to $30.10, $45.15, and $60.20 in 1976 dollars. By contrast, under the law upheld in *Buckley*, candidates seeking a congressional House seat could raise $1,000 from each individual. (The deflation is calculated by using the "all items" Consumer Price Index

The threat of corruption cannot be used to justify Act 64's exceedingly low contribution limits. The State's evidence and the district court's findings are extremely thin, and miss the mark by failing to link the supposed problems with large contributions. While the State need not show money-for-vote chicanery, it must at least make a case arising from the broader interest in the "threat [of] politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. If the claims of widespread, improper influence are true, anecdotal evidence should be freely available. Disclosure of contributions has been required in Vermont for years, and these disclosures should offer documentary support for the claims, if accurate, of dependence on large contributions and the influence of those contributions. No such case was made here. The legislative findings and trial testimony relied upon by the State loudly bemoan the evils of "large" contributions and the public's suspicion of them, but very few examples were provided. The small number of examples given at trial of supposedly "suspicious" contributions for the most part involved contributions that were low enough to have been permitted even by these new limits. Despite having compiled extensive contribution data covering three election cycles, the State never identified the phantom contributors who are allegedly poisoning the system with large contributions – much less established a pattern or practice of corrosive large contributions.

The public has no objective basis to believe that Vermont's citizen legislators are acting contrary to the

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(CPI) for 1976 and 2004 as calculated by the Bureau of Labor Statistics, *available at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. The 1976 CPI was 56.9 and the same index for 2004 was 188.9. To convert 2004 dollars to 1976 dollars, one must multiply the 2004 dollar amount by the quotient of the CPIs, 56.9/188.9 = .301.) Since Vermont's restrictions apply equally to organizational giving, they are even more severe when measured against the higher PAC and party limits upheld in *Buckley*.

interests of the constituents they represent. If (as the state contends) the public has become cynical about the role of money in Vermont's political process, this attitude cannot be traced to large contributions made by so-called special interests. To the contrary, contributions by industry groups and other so-called special interests fall well within the modest limits that have been in effect for many years. The goal of driving down already modest contributions even further because of their source rather than their amount is not sufficient basis to meet *Buckley*'s definition of corruption.

B. Act 64's Limits Restrict Too Much Speech

In *Shrink*, the Court upheld a Missouri statute that imposed a $1,000 limit (which was to be adjusted for inflation) against the charge that inflation had eroded the value of $1,000 in the years since *Buckley* was decided. Although the Court rejected the argument that changes in the Consumer Price Index controlled its analysis, the Court reiterated what it said in *Buckley*, twenty-four years earlier, namely, that there are circumstances where campaign contribution limits can be so low as to violate First Amendment rights. *Shrink*, 528 U.S. at 396-97.

Justice Breyer amplifies the point that states must act with some restraint in setting contribution limits. Justices Breyer and Ginsberg left open the possibility that they would have found the $1,000 limits unconstitutional on a different record. Legislative deference, they explained, does not extend to whether a law,

> by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge. The statutory limit here, $1,075 (or 378, 1976 dollars), is low enough to raise such a question.

Shrink, 528 U.S. 404 (Breyer, J., concurring.)

The record in this case amply demonstrates that Act 64 would radically reduce the funding of political campaigns. By setting its limits so low and applying them so broadly, and by not indexing for inflation, Vermont makes it difficult for many candidates to raise necessary finances. By treating political parties and PACs as if they were individual contributors, moreover, the limits trample the weighty associational interests at stake when individuals who come together for a common purpose. Instead of reining in the "special interests" and industry groups that apparently cause the public concern, Act 64 takes aim at "clean" money from the very sources that pose little or no risk of corruption and of which the public is far less suspicious. Nowhere will the impact be harder felt than in those elections in which a candidate relies on these contributions for "seed money" to jumpstart his or her campaign or for a last hour boost in a close election in which an additional mailing or media spot might be desired.

The Second Circuit ignored this evidence and instead relied on the district court findings that the reduced limits will not harm the "average" candidate. But an "average" candidate does not exist. Mathematical averages are skewed due to the inclusion of numerous incumbents who raised little money because they ran unopposed or faced nominal opposition, and challengers who did not raise the funds necessary to be competitive. Relying on average contributions from past elections as a relevant guide obscures the severe impact Act 64's limits impose upon candidates in competitive elections. These are the races in which candidates run hard-fought campaigns and a full debate of the issues is most critical. Relying on average contributions from past elections as a relevant guide is therefore flawed for the same reasons that it is inadequate to use average spending patterns as a guide for adopting expenditure limits.

Thus, while the limits may not affect all elections in all districts, Act 64's limits will seriously impact candidates in statewide races and many House and Senate elections. *See* pp. 12-14, *supra*. The limits will seriously hamper candidates with contested primaries, and may change political behavior drastically by affecting who runs for office in a given year. *See* p. 10 & n.5, *supra*. Act 64 will prevent candidates from "amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, and undermine "the potential for robust and effective discussion of candidates and campaign issues," *id.* at 29. All of these consequences are fully spelled out in the trial record. *See* pp. 7-14, *supra*.

The new limits hobble candidate fundraising in two additional ways never endorsed by this Court. First, they inexplicably apply on a per-election cycle basis. Under the Federal Election Campaign Act and the laws in effect in every other state, contribution limits apply on a per-election basis, allowing individuals to contribute separately to the candidate's primary and general election funds. As with expenditure limits, Vermont's per-cycle scheme will severely handicap candidates who have exhausted their financial resources and pool of donors in a contested primary. The burden is exacerbated since Vermont primaries are held the second Tuesday of September, less than 60 days before the general election. The burden will fall most heavily on challengers since incumbents do not normally face a primary opponent. It is unreasonable to ask a successful primary candidate to finance a general election after having already solicited the maximum contribution from his or her supporters. A challenger in such a position faces an even tougher battle if her general election opponent faced no opposition in the primary.

Second, Act 64's limits apply equally to individuals, political parties and political committees, including House and Senate leadership committees. Political parties and party committees are critical sources of financing in competitive

elections, but for all practical purposes, these quintessential political organizations can no longer provide any substantial financial support for their candidates. Similarly, the registered political committees of advocacy groups such as the National Rifle Association and Planned Parenthood will no longer be able to use their resources to provide any meaningful financial support for the candidates they support. Historically, these groups are an important source of funds for candidates. They target candidates in competitive elections in an effort to alter or preserve government policies on issues that are important to them. Although the limits on contributions from political parties and PACs apply equally to incumbents and challengers alike, the burden will likely be felt the most by challengers.

The Court of Appeals uncritically accepted the district court's findings with respect to contributions made by individuals and PACs, but rejected the district court's conclusion that political parties must have greater latitude than allowed by Act 64. The district court held that "[s]uch limits would reduce the voice of political parties to an undesirable and constitutionally impermissible whisper." P.A. 177a. The Court of Appeals erroneously held that this argument was foreclosed by *Colorado II*. In that case, this Court held that the government has a sustainable interest in regulating party coordinated expenditures that corresponds to its interest in regulating party contributions generally. It is a strained, and ultimately incorrect, reading of that decision, however, to extend the Court's holding to the broader interest of regulating political parties as if they were individual contributors. By treating political parties as if they were a single individual contributor, Act 64 deprives candidates of necessary party support. Candidates cannot accept direct contributions above the applicable limits (in cash, in kind, or "related"), and parties are essentially prohibited from working with their candidates in any meaningful way.

The Act thus severely and unnecessarily restricts the associational interests that political parties and organizations embody. Political organizations amplify the voices of many small contributors. "It is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do . . . ." *Colorado II*, 533 U.S. at 453; *cf. Colorado I*, 518 U.S. at 637 (Thomas, J., concurring in judgment and dissenting in part) (stating that "[p]olitical associations allow citizens to pool their resources and make their advocacy more effective"). The political committees of organizations like the NRA fulfill the same role. These groups are comprised of many individuals who come together for the very purpose of influencing elections. There is nothing improper or invidious about this – it is the very stuff of democracy.

This Court has specifically noted that the potential for "proliferation of political funds" is an important factor mitigating the burdens that would otherwise be imposed by low contribution limits. *Buckley*, 424 U.S. at 28 n.31. The availability of sizable political party contributions is also an important factor that allows effective campaigning despite low contribution limits on other individuals and groups. Vermont's draconian limitations leave no source of sizable funds except from the personal funds of the candidate and his close relations – a source obviously not available to those who lack personal wealth. Significantly, the FECA limits upheld in *Buckley* drew a distinction between contributions made by individuals and those made by political organizations. *See* 2 U.S.C. § 441a (allowing larger PAC and party contributions, and additional party coordinated contributions). To enable candidates to amass the resources necessary for "effective advocacy," larger contributions by political organizations must be allowed. Binding parties and political committees to the same limits that apply to

individuals will inevitably reduce the resources available to candidates.

Even if the Court of Appeals' understanding of *Colorado II* is correct, and political parties do not warrant special consideration, the case should have been remanded, because the court failed to analyze the extent to which its holding as to political parties exacerbated the effect of the low individual limits.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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Dated: December 14, 2005

Appendix

Copy of Senate Bill 16, 2005 Vermont Laws Public Act 62, which contains certain amendments to 17 V.S.A. §§ 2801 et. seq.
Available at www.leg.state.vt.us

NO. 62. AN ACT RELATING TO CAMPAIGN FINANCE.

(S.16)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 17 V.S.A. § 2801 is amended to read:

§ 2801. DEFINITIONS

As used in this chapter:

* * *

(4) "Political committee" or "political action committee" means any formal or informal committee of two or more individuals, or a corporation, labor organization, public interest group, or other entity, not including a political party, which receives contributions ~~or~~ of more than $500.00 and makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election, or advocating a position on a public question, in any election or affecting the outcome of an election.

* * *

(9) "Two-year general election cycle" means the 24-month period that begins ~~the day~~ 38 days after a general election. Expenditures related to a previous campaign and contributions to retire a debt of a previous campaign shall be attributed to the earlier campaign cycle.

* * *

(11) "Telephone bank" means more than 500 telephone calls of an identical or substantially similar nature that are made to the general public within any 30-day period.

Sec. 2. 17 V.S.A. § 2801a is added to read:

§ 2801a. EXCEPTIONS

The definitions of "contribution", "expenditure" and "electioneering communication" shall not apply to any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication which has not been paid for, or such facilities are not owned or controlled, by any political party, committee or candidate.

Sec. 3. 17 V.S.A. § 2802 is amended to read:

§ 2802. CHECKING ACCOUNT; TREASURER

Candidates who have made expenditures or received contributions of $500.00 or more and political committees shall be subject to the following requirements:

(1) All expenditures shall be paid by either a credit card, or a debit card, check or other electronic transfer from a single checking account in a single bank publicly designated by the candidate or political committee.

(2) Each candidate and each political committee shall name a treasurer, who may be the candidate or spouse, who is responsible for maintaining the checking account.

Sec. 4. 17 V.S.A. § 2803 is amended to read:

§ 2803. CAMPAIGN REPORTS; FORMS; FILING

* * *

(b) The form shall require the reporting of all contributions and expenditures accepted or spent during the reporting period and during the campaign to date and shall require full disclosure of the manner in which any indebtedness is discharged or forgiven. Contributions and expenditures for the reporting period and for the campaign to date also shall be totalled in an appropriate place on the form. The total of contributions shall include a subtotal of nonmonetary contributions and a subtotal of all monetary contributions. The form shall contain a list of the required filing times so that the person filing may designate for which time period the filing is made. Contributions and expenditures received or spent ~~during the 48 hour period~~ after 5 p.m. on the third day prior to the filing deadline shall be reported on the next report.

(c) The form described in this section shall contain language of certification of the truth of the statements and places for the signature of the candidate ~~and his treasurer~~ or the treasurer of the campaign.

(d) All reports filed under this section shall be retained in an indexed file by the official with whom the report is filed and shall be subject to the examination of any person.

(e) Disclosure shall be limited to the information required ~~by this section~~ to administer this chapter.

Sec. 5. 17 V.S.A. § 2804 is amended to read:

§ 2804. SURPLUS CAMPAIGN FUNDS

* * *

(c) Surplus funds in a political committee's or candidate's account after payment of all campaign debts may be contributed to other candidates, political parties, or political committees subject to the contribution limits set forth in this chapter or may be contributed to a charity.

(d) The "final report" of a candidate shall indicate the amount of the surplus and how it has been or is to be liquidated.

Sec. 6. 17 V.S.A. § 2805(d) and (e) are amended to read:

(d) A candidate shall not accept a monetary contribution in excess of $50.00 unless made by check, credit or debit card, or other electronic transfer.

(e) A candidate, political party, or political committee shall not knowingly accept a contribution which is not directly from the contributor, but was transferred to the contributor by another person for the purpose of transferring the same to the candidate, or otherwise circumventing the provisions of this chapter. It shall be a violation of this chapter for a person to make a contribution with the explicit or implicit understanding that the contribution will be transferred in violation of this subsection.

Sec. 7. 17 V.S.A. § 2805a(e) is added to read:

(e) The expenditure limitations contained in this section shall be adjusted for inflation by increasing them based on the Consumer Price Index. Increases shall be rounded up to the nearest $100.00. Increases shall be effective for the first campaign cycle beginning after the general election

held on November 2, 2004. The adjustments shall be calculated retroactively to January 1, 2001. On or before July 1, 2005, the secretary of state shall calculate and publish the amount of each limitation that will apply to the election cycle in which July 1, 2005 falls. On July 1 of each subsequent odd-numbered year the secretary shall publish the amount of each limitation for the election cycle in which that publication falls.

Sec. 8. 17 V.S.A. § 2806a is added to read:

§ 2806a. CIVIL INVESTIGATION

(a) The attorney general or a state's attorney, whenever he or she has reason to believe any person to be or to have been in violation of this chapter or of any rule or regulation made pursuant to this chapter, may examine or cause to be examined by any agent or representative designated by him or her for that purpose any books, records, papers, memoranda, and physical objects of any nature bearing upon each alleged violation and may demand written responses under oath to questions bearing upon each alleged violation. The attorney general or state's attorney may require the attendance of such person or of any other person having knowledge in the premises in the county where such person resides or has a place of business or in Washington County if such person is a nonresident or has no place of business within the state and may take testimony and require proof material for his or her information and may administer oaths or take acknowledgment in respect of any book, record, paper, or memorandum. The attorney general or a state's attorney shall serve notice of the time, place, and cause of such examination or attendance or notice of the cause of the demand for written responses personally or by certified

mail upon such person at his or her principal place of business, or, if such place is not known, to his or her last known address. Any book, record, paper, memorandum, or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of this state for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general or a state's attorney or another law enforcement officer engaged in legitimate law enforcement activities, unless with the consent of the person producing the same. This subsection shall not be applicable to any criminal investigation or prosecution brought under the laws of this or any state.

(b) A person upon whom a notice is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by the order of a court of this state. Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody, or control of any person subject to such notice, or mistakes or conceals any information, shall be fined not more than $5,000.00.

(c) Whenever any person fails to comply with any notice served upon him or her under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general or a state's attorney may file, in the superior court in which such person resides or has his or her principal place of business or in Washington County if such person is a nonresident or has no principal place of business in this state, and serve

upon such person a petition for an order of such court for the enforcement of this section. Whenever any petition is filed under this section, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry into effect the provisions of this section. Any disobedience of any order entered under this section by any court shall be punished as a contempt thereof.

(d) Any person aggrieved by a civil investigation conducted under this section may seek relief from Washington Superior Court or the superior court in the county in which the aggrieved person resides. Except for cases the court considers to be of greater importance, proceedings before superior court as authorized by this section shall take precedence on the docket over all other cases.

Sec. 9. 17 V.S.A. § 2807 is amended to read:

§ 2807. NEW CAMPAIGN ACCOUNTS

Candidates who choose to ~~open~~ roll over any surplus contributions into a new campaign account for public office may close out their former campaign by filing a final report with the secretary of state converting all debts and assets to the new campaign. ~~This final report shall disclose all contributions and expenditures and the disposition of all debts and assets attributable to the former campaign as of the date of the filing of the final report.~~ A candidate shall be required to file a new bank designation form only if there has been a change in the treasurer or the location of the campaign account.

Sec. 10. 17 V.S.A. § 2811 is amended to read:

§ 2811. CAMPAIGN REPORTS; CANDIDATES FOR STATE OFFICE, THE GENERAL ASSEMBLY, POLITICAL COMMITTEES, AND POLITICAL PARTIES

(a) Each candidate for state office, each candidate for the general assembly who has made expenditures or received contributions of $500.00 or more, and each political committee and each political party required to register under section 2831 of this title shall file with the secretary of state campaign finance reports 40 days before the primary election and on the 25th of each month thereafter and continuing to the general election and 10 days after the general election.

* * *

(f) In addition to any other reports required to be filed under this chapter, a candidate for state office or for the general assembly who receives a monetary contribution in an amount over $2,000.00 within 10 days of a primary or general election shall report the contribution to the secretary of state within 24 hours of receiving the contribution. The report shall include all information that is required to be disclosed under the provisions of subsections 2803(a) and (b) of this title.

(g) Each candidate for state office and each candidate for the general assembly who has made expenditures or received contributions of $500.00 or less shall file with the secretary of state, 10 days following the general election, a statement that the candidate has not made expenditures or received contributions of more than $500.00 during the two-year general election cycle.

Sec. 11. 17 V.S.A. § 2831 is amended to read:

§ 2831. CAMPAIGN REPORTS; POLITICAL COMMITTEES AND PARTIES

* * *

(b) A political committee or political party which has accepted contributions or made expenditures of $500.00, or more, for the purpose of influencing a local election or supporting or opposing one or more candidates in a local election shall~~, in addition to other filings required by this chapter,~~ file campaign finance reports ten days before and ten days after the local election with the clerk of the municipality in which the election is held and with the secretary of state.

(c) Any formal or informal committee of two or more individuals, or a corporation, labor organization, public interest group, or other entity, not including a political party, which makes expenditures of more than $500.00 in any one calendar year for the purpose of advocating a position on a public question in any election or affecting the outcome of an election on a public question shall file a report of its expenditures 10 days before and 10 days after the election with the clerk of the municipality in which the election is held and with the secretary of state.

Sec. 12. 17 V.S.A. § 2853(a) is amended to read:

(a) A person shall not be eligible for Vermont campaign finance grants if, during a two-year general election cycle, he or she becomes a candidate by announcing that he or she seeks an elected position as governor or lieutenant governor, or by accepting contributions totaling ~~$500.00~~ $2,000.00 or more or by making expenditures totaling

~~$500.00~~ $2,000.00 or more, prior to February 15 of the general election year.

Sec. 13. 17 V.S.A. chapter 59, subchapter 8 is added to read:

Subchapter 8. Electioneering Communications

§ 2891. DEFINITIONS

As used in this chapter, "electioneering communication" means any communication, including communications published in any newspaper or periodical or broadcast on radio or television or over any public address system, placed on any billboards, outdoor facilities, buttons or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers, or other circulars, or in any direct mailing, robotic phone calls, or mass e-mails that refers to a clearly identified candidate for office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate.

§ 2892. IDENTIFICATION

All electioneering communications shall contain the name and address of the person, political committee, or campaign who or which paid for the communication. The communication shall clearly designate the name of the candidate, party, or political committee by or on whose behalf the same is published or broadcast. The identification requirements of this section shall not apply to lapel stickers or buttons, nor shall they apply to electioneering communications made by a single individual acting alone who spends, in a single two-year general

election cycle, a cumulative amount of no more than $150.00 on those electioneering communications.

§ 2893. NOTICE OF EXPENDITURE

(a) For purposes of this section, "mass media activities" includes television commercials, radio commercials, mass mailings, literature drops, newspaper and periodical advertisements, robotic phone calls, and telephone banks which include the name or likeness of a clearly identified candidate for office.

(b) In addition to any other reports required to be filed under this chapter, a person who makes expenditures for any one mass media activity totaling $500.00 or more within 30 days of a primary or general election shall, for each activity, file a mass media report with the secretary of state and send a copy of the mass media report to each candidate whose name or likeness is included in the activity within 24 hours of the expenditure or activity, whichever occurs first. For the purposes of this section, a person shall be treated as having made an expenditure if the person has executed a contract to make the expenditure. The report shall identify the person who made the expenditure with the name of the candidate involved in the activity and any other information relating to the expenditure that is required to be disclosed under the provisions of subsections 2803(a) and (b) of this title.

Sec. 14. REPEAL

17 V.S.A. § 2808 (preparation of list of accumulated campaign expenditures by secretary of state) and 17 V.S.A. chapter 59, subchapter 7 §§ 2881-2883 (political advertisements) are repealed.

Approved: June 15, 2005